STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellant, v NORTH CENTRAL COOPERATIVE LLC, Defendant-Appellee.	FOR PUBLICATION January 24, 2008 9:00 a.m. No. 268432 Ingham Circuit Court LC No. 05-000847-ND Advance Sheets Version

Before: Murphy, P.J., and Zahra and Servitto, JJ

ZAHRA, J. (*dissenting*).

I respectfully dissent. I conclude that *Dep't of Transportation v Initial Transport, Inc*, 276 Mich App 318, 334; 740 NW2d 720 (2007), was wrongly decided. I agree with and adopt the reasoning set forth by Judge Whitbeck in his dissenting opinion in *Initial Transport*. *Id*. at 334. In short, the Motor Carrier Safety Act (MCSA), MCL 480.11 *et seq*., does not expressly or impliedly provide property protection benefits over and above the $1 million maximum limit set by the Michigan no-fault act, MCL 500.3101 *et seq*. Further, the MCSA is not contrary to or inconsistent with the Michigan no-fault act. The MCSA is a regulatory act that does not create a private right of action against an insured. I would honor the Legislature's $1 million limit for property protection benefits provided in the no-fault act.

In this case, this Court has exacerbated the error of *Initial Transport* by unduly extending the holding of *Initial Transport* to override the no-fault act's express bar against tort actions. In *Initial Transport*, this Court held "that the later-in-time MCSA imposes potential liability in addition to that imposed by the no-fault act on motor carriers carrying hazardous materials, *creating an exception to the $1 million cap for property damage*" found in MCL 500.3121(5). *Id*. at 326 (emphasis added). In effect, *Initial Transport*'s holding raises the Legislature's express $1 million dollar cap in § 3121(5) to $5 million if a motor carrier is hauling hazardous materials under 49 CFR 387.9. Strictly following *Initial Transport*, plaintiff 's claims would be barred by res judicata because plaintiff settled its claim for property damage in its first suit against Farmland Mutual Insurance Company.

Dissatisfied with this result, the majority creates by judicial fiat a legally unsupportable and unduly broad exception to the no-fault act. Now, instead of limiting the impact of *Initial Transport* to a judicial rewrite of the property protection benefit provisions of § 3121(5), this Court has emasculated the Legislature's longstanding abolition of tort liability arising from the

ownership, maintenance, or use of a motor vehicle as it relates to the hauling of certain hazardous materials. The majority's interpretation of the relevant statutory provisions is at odds with traditional methods of statutory construction.

MCL 500.3135(3) provides, "Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect is abolished . . . ." There is no dispute that defendant insured the tractor-trailer with Farmland and that the security required by MCL 500.3101 was in effect at the time of the accident relative to the tractor-trailer. Further, there is no dispute that the liability plaintiff seeks to impose rests in tort law and arises from the use and operation of the tractor-trailer within this state. Given that our primary task in construing a statute is to discern and give effect to the intent of the Legislature and that clear, unambiguous statutory language reflects the legislative intent and must be enforced as written, *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004), it is inescapable that the no-fault act bars plaintiff 's negligence-based tort action.

Moreover, to the extent that the MCSA is inconsistent with the no-fault act, the majority ignores the introductory phrase of MCL 500.3135(3), which provides, "[n]otwithstanding any other provision of law . . . ." This legislative directive plainly instructs us to apply the no-fault provision abolishing tort liability over "any other provision of law . . . ." Thus, no tort liability can be created out of the MCSA if, as here, it arises "from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect . . . ." MCL 500.3135(3).

To the extent I must follow *Initial Transport*, I would limit it to its express holding—that the MCSA creates an exception to the $1 million cap in § 3121(5). I would not expand *Initial Transport* to override the no-fault act's abolition of tort liability as it relates to the hauling of certain hazardous materials.

For these reasons, I would affirm the judgment of the circuit court. I urge the Supreme Court to review this case and the rule of law created in *Initial Transport*.

/s/ Brian K. Zahra